2013 WL 8743790 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Patricia A. MCCOLLOR, Plaintiff-Appellee,
v.
Frederick J. MCCOLLOR, Jr., et al, Defendant-Appellants.

No. KEN-12-594.
August 25, 2013.

On Appeal from the Superior Court for Kennebec County

Brief of Appellee

Peter Bickerman, Esq., Bar No. 1884, P.O. Box 30, Readfield, ME 04355, (207) 446-2484, for appellee.

Michael J. Levey, Esq., Bar No. 277, Levey, Wagley & Putman, P.A., 161 Main Street, 1-A, P.O. Box 7, Winthrop, ME 04364, Telephone: (207) 377-6966, for appellee.

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

CASES

*1 STATEMENT OF FACTS

Plaintiff-Appellee Patricia A. McCollor (hereinafter "Pat" or "Mrs. McCollor") was born on XX/XX/1944. See the Trial Transcript, Volume I (hereinafter "TT I"), at 5. Frederick J. McCollor, Sr. (hereinafter "Fred") was born on XX/XX/1940. (TT I at 11). Pat and Fred married in 1964. (TT I at 6).

Pat and Fred had two children. Their daughter, Cheryl, now named Cheryl Stanton (hereinafter "Cheryl"), was born in 1965. (TT I at 7). Their son, Frederick J. McCollor, Jr. (hereinafter "John"), was born in 1969. (TT I at 8). Shortly after Cheryl was born Pat and Fred moved to Lawrence Street in Waterville, Maine, in a house next door to the house owned by Fred's parents.

After working in the private sector for several years, Fred began working for the State of Maine and continued working for the State until his retirement in approximately 1997. (TT I at 8-9). Pat began working outside of the home in the mid-1970s, when Cheryl and John were both in school. After working for Day's Jewelers, C.F. Hathaway and Crowe Rope, Pat began working for Huhtamaki in 2001. Now Pat works in the technology and development lab at Huhtamaki. (TT I at 10-11).

During the mid-1990s Pat and Fred moved into the house at 7 Lawrence Street previously occupied by Fred's parents. Fred's parents had conveyed the house to Fred and his sister, Mary Jane Baker. Eventually, Pat and Fred sold their previous home and used a portion of the proceeds to purchase, for the sum of $30,000, Ms. Baker's ownership interest in 7 Lawrence Street. (TT I at 91). When Pat and Fred moved into 7 Lawrence Street there was a tenant living in a portion of the first floor. (TT I at 95). Their son John also was living in the house at that ***2** time, in a portion of the second floor. (TT I at 90). In 2006, the ownership of 7 Lawrence Street was formally transferred from Fred and Ms. Baker to Fred and Pat in joint tenancy. (TT I at 13, 16, 22).

In 2006 Fred's health began to deteriorate. He was suffering from frequent headaches and loss of balance. Fred's symptoms worsened during 2007. (TT I at 18). By that time Fred and Pat were sleeping in separate bedrooms because Fred was a chain smoker and Pat has asthma. (TT I at 23). Pat would get up during the night and go to Fred's bedroom to check on him. Fred constantly expressed fear of falling. (TT I at 24). John purchased an air horn for Fred to sound in the event he needed assistance. When Fred sounded the horn Pat immediately came to Fred to find out what was wrong and what needed to be done. This left

Pat feeling stressed and tired. (TT I at 25). During this time Pat was working at Huhtamaki from 7am until 5pm, and sometimes later when required. (TT I at 19). To add to Pat's stress, her mother died in December 2007, and there was a memorial service in May 2008. (TT I at 35).

Fred and John had a fairly good father-son relationship. Pat's relationship with John was strained. See the Trial Transcript, Volume II (hereinafter "TT II") at 60. Nevertheless, during Fred's illness Pat and Fred depended upon John for advice. (TT I at 38). Pat was frightened and depended upon John for emotional and practical support. Pat knew that if she needed anything she could always call John and he would be there for his parents. (TT I at 45-46). By the start of 2007 Fred had stopped driving. John frequently provided transportation for Fred. (TT I at 27).

In 2008 Fred complained of increasing pain and begged Pat for her help, but he refused to see a physician. Pat asked John for assistance, and John convinced his father to schedule a ***3** medical appointment. (TT I at 28-29). In September 2008, Fred was diagnosed as having lung cancer and inoperable brain tumors. (TT I at 31-32). This news placed Pat on an emotional roller-coaster. She was worried and frightened for her husband. (TT 1 at 32). Fred became depressed and experienced severe mood swings. Fred's depression was manifested by his abandonment of ham radio equipment he had been operating for years. (TT at 33-34). Because Pat had a full-time job outside the home and because John was placed on administrative leave from his information technology job with the State during much of 2008 (TT II at 18-19), John transported Fred to most of his medical appointments and treatments. (TT I at 44, TT II at 147, 149). As Fred's health declined Pat was able to change her work schedule so that she was working from 5am until 1:30pm and spending more time with Fred in the afternoon and evening. (TT I at 20-21).

Prior to October 20, 2008, Pat had no discussions with Fred or her children about transferring ownership of the home. (TT I at 37). John agrees that he had no such discussions with Pat. (TT I at 149). Brenda Bolduc was romantically involved with John from August 2007 until the end of 2010. During most of that period John lived with Ms. Bolduc at her residence. (TT II at 5). John would spend some nights at this parents' home when John's daughter visited or when Fred was undergoing chemotherapy. (TT II at 6, 59). Ms. Bolduc is a certified medical assistant, and John discussed Fred's health with her. (TT II at 7). According to Ms. Bolduc, after Fred's cancer diagnosis John called Cheryl and told his sister that they needed to plan for a nursing home placement for Fred and whether they could qualify Fred for MaineCare. John also told Cheryl that they would need to consider how to handle the house. (TT II at 10-11). In later conversations with Ms. Bolduc, John expressed concern that if Fred went into a nursing home ***4** MaineCare would step in and take the house as reimbursement for medical expenses. (TT II at 13).

The records of Gateway Title of Maine, Inc. (hereinafter "Gateway Title") reflect that prior to October 20, 2008 Gateway opened a file with the name "Stanton," Cheryl's last name. See the Appendix (hereinafter "App.") at 42. A handwritten note in evidence indicates that there was a phone conversation between Gateway Title and "Cherrie," (App. at 41), which was Fred's nickname for Cheryl. (TT I at 138). At trial Cheryl testified that John informed her that their parents were going to transfer the house to them. Cheryl testified that she may have spoken once with Gateway Title's in-house counsel John Kirk about the preparation of a deed. (TT I at 138).

On the afternoon of October 20, 2008, Pat returned home from work to find that John was with Fred. Pat was told that by Fred that they needed to go to Gateway Title to "sign the house over to John and Cheryl..." (TT I at 36). When Pat asked why this was necessary, John told her that without a transfer MaineCare could take the house away as reimbursement for Fred's medical expenses. When Pat heard this she was scared out of her mind. She was afraid of losing the home and having to find a new place to live with her sick husband. (TT I at 37). Pat trusted John to provide her and Fred with accurate information about MaineCare and the house. Pat and Fred "were both so stressed out from the diagnosis that we had to have somebody with a clearer mind than we had at that time." (TT I at 48).

In fact, contrary to John's representations to his parents, MaineCare would not have evicted Pat and Fred from the family home. Pat later understood that, at worst, MaineCare might place a lien on the property to obtain reimbursement. (TT I at 74). [1] In any event, MaineCare ***5** was incurring no liability for Fred's care at the time of John's representations. In 2008 and for some time thereafter Fred's medical expenses were paid by a combination of his State retiree health insurance and Medicare. (TT I

at 75). John did not even seek MaineCare coverage for Fred until 2010. (TT I at 154). John's assertion that the house would be lost to the MaineCare Program was the reason that Pat agreed to transfer her ownership of the house. (TT I at 121).

On October 20, 2008, following their brief conversation, John drove Pat and Fred to the Waterville office of Gateway Title. (TT I at 37). Previously, John had called the Waterville office and asked Gateway Title to prepare a deed. (TT II at 99). Pat and Fred signed the deed at Gateway Title. The deed conveyed the land and buildings at 7 Lawrence Street, plus the contents therein, to Cheryl and John "for no actual consideration." (App. at 37). According to Jennifer Gagliardi, who processed the transaction for Gateway Title, it took less than five minutes to complete the closing. (TT II at 107). Pat had no idea that her living arrangements would change as a result of the deed. (TT I at 43).

The final two paragraphs of the deed referenced the fact that the grantors were over the age of 60 and were entitled to the protections of "The Improvident Transfer Statute." The deed further asserted that the grantors had "consulted with an attorney of their own choosing" and were not dependent on the grantees. (App. at 37). Ms. Gagliardi testified that John Kirk of Gateway Title drafted the language in the deed pertaining to the improvident transfer statute. (TT II at 104), and Kirk agreed (TT II at 90). The standard procedure of Gateway Title included a conversation between Kirk and **elderly** grantors before a deed was signed. Kirk testified that he customarily informs parents of the possible adverse consequences of a transfer to their children, including the 60 month "look-back period" employed by MaineCare. (TT II at 88).

***6** In this case, however, Kirk has no specific recollection of having any conversation with Pat or Fred McCollor (TT II at 78). [2] When Kirk speaks with potential transferors in his role as title company employee he does not tell them that he represents them. (TT II at 96). In his deposition testimony Kirk said that he did not have an attorney-client relationship with Pat. (TT II at 95). If the McCollor transaction had not closed Gateway Title would have lost slightly more than $100. (TT II at 95). Pat testified that she did not speak with any attorney about transferring her home to her children before she signed the deed. (TT I at 38).

Following the conveyance of October 20, 2008, Pat and Fred continued to reside at 7 Lawrence Street. Fred's health continued to deteriorate. On June 4, 2010, Fred suffered a stroke and was hospitalized. (TT I at 48-49). When Pat arrived at the hospital she communicated with Fred but it was hard to comprehend his speech. (TT I at 50). While in the hospital Fred was depressed, confused and frustrated. (TT I at 51, 63). As a result of the stroke Fred suffered from left-side paralysis. (TT II at 139). Cheryl came to Maine to see her father. Approximately three days after Fred's stroke Cheryl and John arranged for Fred's dog to be euthanized. (TT I at 53). Fred had owned the dog since 1996 and 1997 and was quite attached to him. (TT I at 54-55). Cheryl and John began clearing out room in the house where many of Fred's items were stored. When Pat protested, Cheryl reminded her that Cheryl's name was on the deed. (TT I at 61).

On June 9, 2010, five days after suffering his stroke, Fred allegedly signed from his hospital bed a Durable Power of Attorney form (hereinafter "POA") presented to him by John. (App. at 43-53). Fred's alleged signature on the POA form does not resemble his previous signature. Compare, for example, App. at 39 to App. at 53. Pat did not see this POA until after ***7** Fred's death. (TT I at 64). The POA form named John as attorney-in-fact as Cheryl as successor attorney-in-fact for Fred. (App. at 45). Although John claimed that the POA was needed for purposes of medical decision-making (TT I at 197), he acknowledged that the POA gave him broad authority over Fred's financial affairs. (TT I at 202).

Pat and Fred had maintained separate bank account since she started working outside the home. (TT I at 58). When the POA was executed in 2010 Fred had no joint bank accounts with John. If there had been any joint bank accounts, they were closed prior to 2006. (TT 1191-193). On June 17, 2010, John opened a new account at TD Bank. John then began systematically to transfer funds from Fred's savings account and Fred's checking account and deposit them in John's new account. John told Brenda Bolduc that he was going to move the money from Fred's accounts so that it could not be traced by MaineCare. (TT II at 13). Based on bank records which are summarized in Plaintiff's Exhibits 19 and 20 (App. at 62-67), between June 2010

and Fred's death in December 2010, John transferred a total of $10,974.43 from Fred's bank accounts. Although by its terms the POA expired upon Fred's death (App. at 44), during the five-week period immediately after Fred died John transferred an additional sum of $1,528.35 from Fred's accounts, essentially emptying those accounts. (TT I at 186). The total amount transferred by John to his new account following execution of the POA was $22,502.78. (App. at 67). At trial John did not take issue with the foregoing analysis of the amount of money transferred. (TT I at 169).

By its terms the POA prohibited the assignment or designation of any of Fred's assets to John, directly or indirectly. (App. at 52). Nevertheless, the itemization of fund transfers in the record (App. at 62-66) demonstrates that the vast majority of funds transferred were used either for John's personal benefit or for maintenance of the residence that had been transferred in 2008 ***8** to John and Cheryl. The only significant purchase John made for Fred's benefit was a lift chair that cost approximately $1,300, and that purchase was made with funds from Fred's accounts. (TT I at 176, TT II at 156). In addition to taking money from Fred's accounts, once Fred was hospitalized John began collecting $400 per month in rent from the tenant who had previously paid Fred. (TT I at 171).

In the summer of 2010 Fred was transferred from the hospital to Oak Grove Nursing Home. In October 2010, Pat opened a letter that was mailed to her home and learned that John had applied for MaineCare for Fred. (TT I at 73). John expressed anger that this mother had learned of the MaineCare situation. (TT II at 17). Fred did qualify for MaineCare (App. at 55), but the State imposed a MaineCare penalty based on the transfer of the residence to John and Cheryl for no consideration. (App. at 61).

Around December 1, 2010, a decision was made to place Fred in hospice care at the nursing home. (TT I at 184). Fred died on December 15, 2010. (TT I at 77). Within a few weeks after Fred's death John accused Pat of selling some of Fred's radio equipment. Pat denied selling any of Fred's property but expressed the opinion that she had inherited Fred's personal property. John disagreed, telling her that he and Cheryl owned the items “because of way the [2008] deed was written up...” (TT I at 213). John became angry and told his mother: You want to fight, bitch? I'll give you a fight you're not going to forget in a long time.” (TT I at 122). The next day Pat came home from work to discover that John had padlocked the dining room, the living room, the back bedroom, the room used for Pat's office and Fred's former area which contained Pat's winter clothes. Pat's drawers and bureaus were gone, and her clothes were scattered. (TT I at 121). John testified that he had barred his mother from entering portions of house in order “to secure any remaining items or property there...” (TT I at 215).

***9** In early 2011, following the breakup of his relationship with Brenda Bolduc, John asked Ms. Bolduc to have no further contact with Pat. (TT II at 25). Later, John accused Ms. Bolduc of remaining friendly with Pat just to get back at him. (TT II at 32). In July 2011, John sent an email to Ms. Bolduc asking if she was with him or against him in his dispute with his mother. (TT II at 33). After Ms. Bolduc replied in a manner that was not to John's liking, she discovered that previous emails were disappearing from her Yahoo account. Ms. Bolduc then received a message from Yahoo that someone was trying to access her account. (TT II at 38). Ms. Bolduc also discovered that someone had signed into her Facebook account and sent an angry message in her name. (TT II at 71). Ms. Bolduc contacted the State Police (TT II at 47), who commenced an investigation.

Justin Kittredge, a law enforcement officer assigned to the State Police Computer Crimes Unit (TT II at 111), testified that a number of IP connection logs to Ms. Bolduc's accounts were found in the State of Maine computer system, where John worked. (TT II at 114). Kittredge interviewed John, who acknowledged that he had accessed Ms. Bolduc's accounts from his state computers less than two dozen times but claimed he could not recall if he erased anything from Ms. Bolduc's accounts. (TT II at 116-117). John told Kittredge that he had permission to access Ms. Bolduc's accounts, but Ms. Bolduc denied giving John permission to access her accounts. (TT II at 116).

PROCEDURAL HISTORY

Mrs. McCollor, acting both individually and in her capacity as Personal Representative of the Estate of her husband Fred,[3] brought suit in Maine District Court in February 2011 against ***10** her son John and her daughter Cheryl Stanton. (App. at

2) The case was removed to Superior Court in March 2011 (App. at 3), and after litigation on requests for interlocutory relief the case was assigned to a Single Justice (Mills, J.).

Mrs. McCollor filed an Amended Complaint in Superior Court in December 2011 (App. at 7). The Amended Complaint (App. at 28-36) consisted of four counts. Count I alleged that John and Cheryl had violated the Improvident Transfers of Title Act, 33 M.R.S. §1021, et seq., when they took ownership of their parents' home in October 2008. Count II alleged that the 2008 transfer of the marital residence was the result of undue influence exercised by John over Pat and Fred. Count III alleged that John committed conversion by exercising unauthorized dominion and control over items of personal property in which Pat had an ownership interest.[4] Finally, Count IV alleged that John breached his fiduciary duties by utilizing the Power of Attorney he had received to convert Fred's funds for his own use.

A non-jury trial commenced on the morning of January 24, 2012, and concluded on the afternoon of January, 25, 2012. (App. at 8). The parties then filed post-trial memoranda that dealt with the merits and with certain evidentiary disputes. The Superior Court issued its Judgment in an 11-page opinion dated October 12, 2012. (App. at 13-23). The Court summarized the pertinent evidence, noting at the outset that “the testimony of defendant John McCollor was not credible and is not accepted.” (App. at 14). By contrast, the Court found that Brenda Bolduc testified credibly about the execution of a document (actually a blank piece of paper when signed by Fred) purporting to express Fred's intent in transferring his residence to John and Cheryl. (App. at 21).

***11** The Court concluded that the transfer of the McCollor residence in 2008 violated the Improvident Transfers of Title Act. In the words of the Court:

The plaintiff and her husband were **elderly** and dependent people and transferred their real estate to their children for no consideration and as a result of undue influence on the part of defendant John McCollor. The defendants have not rebutted the presumption of undue influence. Neither the plaintiff nor her husband was represented by independent counsel.

(App. at 22).

The Court also found for Mrs. McCollor on Count II of her Amended Complaint, her common law claim of undue influence. The Court concluded that Mrs. McCollor had established that John exercised undue influence in obtaining the transfer of his parents' real estate. (App. at 22). Finally, the Court found that John breached his fiduciary duty with regard to his transfers and use of Fred's money. (App. at 22-23).

With respect to remedies, the Court rescinded the deed of October 20, 2008, that had transferred Pat and Fred's home to John and Cheryl. (App. at 23). The Defendants were ordered to hold the real estate located at 7 Lawrence Street in Waterville in a constructive trust for the benefit of the Plaintiff. Further, judgment was entered for the Plaintiff on Count IV in the amount of $21,189.90, plus prejudgment interest, post-judgment interest and costs. That damages award was derived from the amount of finds transferred from Fred's bank accounts to John's account, minus the cost of the lift chair purchased for Fred's benefit. (App. at 20). The Court declined to award punitive damages. (App. at 23).

Each side filed post-judgment motions. The pace of the litigation was affected by the death of Daniel Bates, the Plaintiffs trial counsel, and by the motion of Alton Stevens, the Defendants' trial counsel, to withdraw. On November 29, 2012, the Superior Court issued its ***12** Order on Pending Motions. (App. at 24-27). The Court did not change the substance of its decision, but did clarify the deed rescission language. The Court also clarified that the money judgment was entered in favor of the Estate of Frederick J. McCollor, Sr. and that the personal property taken by the Defendants from 7 Lawrence Street must be returned to, and for the benefit of, Fred's Estate. (App. at 25). The Court corrected references in its decision to the location of the nursing home where Fred was transferred. The remainder of the Defendants' motion to amend findings, to make additional findings

and for a new trial was denied. (App. at 26). The Court also granted the motion of Attorney Stevens to withdraw as counsel for the Defendants. (App. at 26).

On December 18, 2012, acting through new counsel, the Defendants filed in the Superior Court a Notice of Appeal to the Law Court. (App. at 11).

ISSUES PRESENTED FOR REVIEW

1. Is there competent evidence in the record to support the Superior Court's finding that the Defendants violated the Improvident Transfers of Title Act?

2. Did the Superior Court commit prejudicial error by excluding an "Order Summary" generated by Gateway Title of Maine, Inc.?

3. Is there competent evidence in the record to support the Superior Court's finding that John McCollor procured the transfer of his parents' home through the exercise of undue influence?

4. Is there competent evidence in the record to support the Superior Court's assessment of compensatory damages in favor of Fred McCollor's Estate resulting from John McCollor's breach of fiduciary duty?

*13 ARGUMENT

SUMMARY OF ARGUMENT

This case, similar to many other intra-family disputes, was bitterly contested at trial. After hearing two days of testimony and receiving numerous exhibits in evidence, the Presiding Justice found in favor of Plaintiff Pat McCollor on most of her claims. That judgment stood despite lengthy post-judgment motions.

Now, the Defendants have submitted a brief to this Court which, while well-written, amounts to little more than a quarrel with the Superior Court over the meaning of the evidence. As this Court is well aware, where the record contains competent evidence supporting the conclusions reached by the trial court an appellate court may not disturb the judgment, even if the record contains other evidence which might reasonably support different conclusions. There is ample evidence in this record to support the Superior Court's decision that the October 2008 deed from Pat and Fred McCollor to John McCollor and Cheryl Stanton violated the Improvident Transfers of Title Act (hereinafter "the ITTA") and, accordingly, was subject to rescission. At trial the Plaintiff established each of the elements required for application of the ITTA.

Although the finding of statutory liability under the ITTA is a sufficient basis for the remedies of rescission and imposition of a constructive trust, there also is ample evidence in this record to support the Superior Court's decision that John McCollor is liable at common law based on his procurement of the October 2008 deed by exercising undue influence over his parents. Further, there is ample evidence to support the finding that John McCollor breached his fiduciary duty under the POA by converting Fred's funds for John's benefit, thereby justifying the award of compensatory damages to Fred's Estate made by the Court.

***14** Finally, the Superior Court acted well within its broad discretion when it excluded from evidence the "Order Summary" (App. at 40) that the Defendants sought to introduce through the testimony of John Kirk, Gateway Title's in-house attorney. Given Mr. Kirk's testimony regarding his lack of recollection of any conversation he may have had with Pat and Fred McCollor about the proposed real estate transfer to their children and Mr. Kirk's testimony that he did not make the entry on the document regarding his alleged conversation with Pat and Fred, the "Order Summary" lacked probative value. In any event, the Defendants adduced testimony from Mr. Kirk and from Jennifer Gagliardi concerning the alleged standard operating procedures of Gateway Title prior to a conveyance from **elderly** parents to children, so the exclusion of the "Order Summary" resulted in no

cognizable prejudice to their cause. Most importantly, the evidence demonstrates that Mr. Kirk was not acting as "independent counsel" for Pat and Fred in this transaction, as that term is defined in the ITTA. Nothing contained in the "Order Summary" would alter that conclusion, and for that basic reason the Defendants were not prejudiced by the exclusion of the document.

I. THE SUPERIOR COURT CORRECTLY RULED FOR THE PLAINTIFF AND RESCINDED THE DEED PURSUANT TO THE IMPROVIDENT TRANSFERS OF TITLE ACT.

"The Improvident Transfer of Title Act is a powerful device that can be used to help repair **elderly** clients who have been financially damaged through exploitation." D. Culley and H. Sanders, *Exploitation and **Abuse** of the **Elderly** during the Great Recession: A Maine Practitioner's Perspective,"* 62Me. L. Rev. 430, 445 (2010) (footnote omitted). "At the heart of the Improvident Transfers of Title Act is a presumption of undue influence." First Union National Bank v. Curtis, 2005 ME 108, n. 2, 882 A. 2d 796, 797. The effect of the ITTA is to ***15** shift the burden of proof that would otherwise be borne by the plaintiff in a claim of undue influence. *See Estate of Sylvester v. Benjamin*, 2001 ME 48, ¶12, 767 A. 2d 297, 301.

In the words of the ITTA:

> In any transfer of real estate or *major* transfer of personal property or money for less than full consideration... by an **elderly** person who is dependent on others to a person to whom the **elderly** dependent person has a confidential or fiduciary relationship, it shall be presumed that the transfer was the result of undue influence, *unless* the **elderly** dependent person was represented in the transfer... by independent counsel. When the **elderly** dependent person successfully raises the presumption of undue influence by a preponderance of the evidence and when the transferee... fails to rebut the presumption, the **elderly** dependent person is entitled to avoid the transfer... and entitled to [other legal and equitable relief]...

33 M.R.S. §1022(1) (emphasis added).

The ITTA provides that a "confidential or fiduciary relationship" in this context includes a "family relationship between the **elderly** dependent person and the transferee..." 33 M.R.S. §1022(2)(A). Accordingly, Pat and Fred's conveyance to their children clearly was a transfer of property made in the context of a confidential or fiduciary relationship. It is equally clear that both Pat and Fred were "**elderly** persons" within the "60 years of age or older" definition set forth in 33 M.R.S. §1021(2). At the time of the October 2008 conveyance Fred was 68 years old and Pat was 64 years old. (TT I at 5, 11). It also is undisputed that Pat and Fred transferred their property to John and Cheryl "for no actual consideration." (App. at 37).

A. Pat and Fred McCollor were each "Dependent Persons" within the Meaning of the ITTA.

In their brief to this Court the Defendants appear to concede that Fred McCollor was a "dependent person" as defined in the ITTA, but they contend that with respect to Pat McCollor ***16** "[t]here was no evidence of dependency in the record..." (Appellants' brief at 17). This assertion is simply incorrect. The statutory definition reads in pertinent part:

> "Dependent," with respect to an **elderly** person, means wholly *or partially* dependent upon one or more other persons for care or support, either *emotional* or physical, because the **elderly** person... [suffers from a significant limitation... in emotional or mental functioning... or [i]s suffering or recovering from a major illness...

33 M.R.S. §1021(1)A&B) (emphasis added).

It is apparent that Fred McCollor became dependent upon his son John for various forms of support, both material and emotional, because of the major illness from which Fred suffered from 2006 until his death in 2010. There also is considerable evidence

in the record to support the finding that Pat McCollor became partially dependent upon her son John for support because she was suffering from a significant limitation in her emotional and mental functioning as a result of the stress resulting from her full-time work obligation outside the house and her provision of care at all other hours (including overnight) to her terminally-ill husband. Pat testified in detail regarding her fatigue and stress during that time, as well as her fears about her husband's deteriorating health and his uncertain future. *See, for example,* TT I at 25, 32.

Pat also testified that she as well as Fred depended upon John for advice and support. (TT I at 38). Pat knew that if she or Fred needed anything John would be there to provide it. (TT I at 45-46). As Fred's health deteriorated during 2008, Pat asked John for assistance in persuading Fred to obtain medical treatment, and John did provide that assistance. (TT I at 28-29). On October 20, 2008, when John told Pat that the residence needed to be transferred to avoid losing it to MaineCare, Pat relied upon John's advice. Pat trusted John to provide her and Fred with accurate information. Pat testified that she and Fred "were both so stressed out... that ***17** we had to have [advice from] somebody with a clearer mind than we had at that time." (TT I at 48).

The fact that Pat and John did not have a particularly warm mother-son relationship does not detract from the evidence that, in matters pertaining to Fred's illness and the conveyance of the house, Pat had significant functional limitations and she became at least partially dependent upon John for advice and support. Unfortunately, John directed Pat and Fred to take actions that served his interests and harmed their interests. [5]

B. Neither Pat nor Fred McCollor was Represented by "Independent Counsel" when they Transferred their Home for No Consideration.

The presumption of undue influence under the circumstances set forth in the ITTA does not apply if "the **elderly** dependent person was represented in the transfer by independent counsel." 33 M.R.S. §1022(1). The ITTA defines the term "independent counsel" as "an attorney retained by the **elderly** dependent person to represent only that person's interests in the transfer." 33 M.R.S. §1021(3) (emphasis added).

The argument advanced by the Defendants on this score lacks credibility. Pat McCollor testified that she did not speak with any lawyer, either in person or by phone, about transferring the house before she signed the deed on October 20, 2008. (TT I at 38). No other witness claimed personal knowledge of such a consultation with counsel. John Kirk, Gateway Title's in-hous counsel, testified that he had no independent recollection of the McCollor transaction. (TT II at 74). Accordingly, Mr. Kirk could not recall what he might have said to Pat or Fred. (TT II at 78). Mr. Kirk proceeded to testify about what he customarily informs **elderly** persons desiring to transfer property to their children. (TT II at 88). Mr. Kirk testified that during these ***18** customary conversations he does not represent the transferors and he does not advise them as to whether or not to consummate the transaction. (TT II at 96-97).

In his pretrial deposition testimony Mr. Kirk said that he did not have an attorney-client relationship with Pat. (TT II at 95). At trial, Mr. Kirk claimed that he works for Gateway Title as an "employee" rather than an attorney. (TT II at 94). Accordingly, even if the factfinder were compelled to believe that there was some kind of consultation between Pat and Mr. Kirk prior to the execution of the deed - about which the evidence is ambiguous at best - there is no reasonable basis for concluding that Pat and Fred were represented by any counsel in this transaction, let alone by independent counsel. There is no evidence that Pat or Fred "retained" Mr. Kirk to advise them. Further, it is clear that as an employee of Gateway Title (which had a financial incentive to complete the conveyance), Mr. Kirk could not represent "only" the interests of Pat and Fred in this transaction. See 33 M.R.S. §1021(3).

In *Verrill v. Moore*, 1996 Me. Super. LEXIS 403, the Superior Court for York County (Crowley, J.) denied a defense motion for summary judgment of a claim brought under the ITTA. The defendant in *Verrill v. Moore* alleged that the plaintiff had been represented in the conveyance by independent counsel. The Superior Court rejected that argument in light of evidence that Moore, the defendant, had procured counsel for the plaintiff and that counsel's "contact with Verrill consisted of a 4.7 minute phone call." Similarly, even if the Court were to disbelieve the testimony of Pat McCollor and conclude that she did speak

with John Kirk, because of Mr. Kirk's role as a Gateway Title employee there is no way to characterize him as an "independent counsel."

***19 C. The Superior Court Committed No Prejudicial Error by Excluding from Evidence the "Order Summary" Generated by Gateway Title.**

For the reasons set forth in the preceding section, the argument made by the Defendants about the supposed importance of Gateway Title's "Order Summary" is misguided. A hearsay statement contained in a supposed business record regarding an alleged phone conversation between Mr. Kirk and "parents" (App. at 40) may be probative of whether there was a conversation, but it is legally irrelevant. Under these circumstances Mr. Kirk was incapable of acting as an independent counsel retained to represent only the interests of Pat and Fred McCollor.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103(a), M.R.Evid. The proponent of evidence "has the burden of demonstrating that the trial court **abused** its discretion by excluding the evidence *and* that he was thereby prejudiced." *Todd v. Andalkar*, 1997 ME 59, ¶7, 691 A. 2d 1215, 1218 (emphasis added). Further,

> Prejudicial injury occurs only if the evidence excluded was relevant and material to a crucial issue and if it can with reason be said that such evidence, if admitted, would probably have affected the result or had a controlling influence on a material aspect of the case.

Taylor v. Hill, 464 A. 2d 938, 943 (Me. 1983), *quoting Minott v. F. W. Cunningham & Sons*, 413 A. 2d 1325, 1329 (Me. 1980).

In this case it is evident that nothing contained in the "Order Summary's would have affected the outcome of the trial. Both John Kirk and Jennifer Gagliardi were permitted to testify regarding Gateway Title's alleged standard operating procedures before executing deeds in which **elderly** parents conveyed real estate to their children. Those standard operating procedures, even if they were followed in this situation, did not provide Pat and Fred with ***20** representation by independent counsel. Accordingly, there is no need for this Court to opine regarding: a) whether the "Order Summary" and its contents qualified as an exception to the rule against admissibility of hearsay pursuant to Rule 803(6), M.R.Evid.; and b) whether the Superior Court ruled correctly that the Defendants failed to establish an adequate foundation for admissibility of the document (TT II at 84, 86-87). If any error occurred in this regard, it surely caused no prejudice to the Defendants.

D. There is Ample Evidence Supporting the Remedial Sanctions Against Cheryl Stanton for Violation of the ITTA.

In a two-sentence footnote in their brief, the Defendants assert that "no cause of action has been proven for violation of the ITTA against Cheryl [Stanton]." (Appellant's brief at 17, n.9). In the absence of any attempt by the Defendants to present an analysis of the alleged insufficiency of the evidence pertaining to Cheryl, this Court should not address the issue on its merits. In the words of this Court:

> We will apply the settled appellate rule enunciated by the First Circuit Court of Appeals that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived... An issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.

Mehlhorn v. Derby, 2006 ME 110, ¶11, 905 A. 2d 290, 293 (internal quotation and citation omitted). See also D. Alexander, *Maine Appellate Practice*, §404 at 218 (3rd ed. 2008).

Nevertheless, if this Court chooses to consider the issue of the sufficiency of the evidence pertaining to Cheryl, this Court should affirm the judgment against her and the ITTA remedies imposed on both Defendants: rescission of the deed of October

20, 2008; holding the real estate at 7 Lawrence Street in a constructive trust; and the return of any personal property taken from 7 ***21** Lawrence Street. (App. at 23, 25). [6] Brenda Bolduc's testimony established that shortly after Fred's cancer diagnosis, John conferred with Cheryl about a number of items, including how their parents' home could be protected from being taken by MaineCare. (TT II at 10-12). Although Cheryl testified that she could not recall whether she spoke to anyone at Gateway Title (TT II at 136), the record reflects that Gateway Title opened its file on the conveyance of 7 Lawrence Street in the name of "Stanton." That file name appears both in Gateway Title's invoice to Fred (App. at 42) and in the "Order Summary" the Defendants attempted to place in evidence. (App. at 40).

Clearly, Cheryl was an active participant in arranging for the transaction which led to her parents' transfer of the real estate at 7 Lawrence Street "and the contents therein..." (App. at 37). Moreover, when Fred was hospitalized in 2010 after his stroke, Cheryl played an active role in reorganizing the house. Cheryl testified that when Pat objected to what Cheryl was doing, Cheryl told her mother that "well, technically, it's not your house. My name is now on the deed..." (TT I at 147). As someone who assisted in procuring a conveyance in violation of the ITTA and who obtained tangible benefits from that conveyance, Cheryl was properly held liable and was subject to the remedies permitted by the ITTA.

E. By its Terms the Deed Resulted in a Major Transfer of Personal Property.

In arguing the record does not justify the Superior Court's order that John and Cheryl return any items of personal property they removed from 7 Lawrence Street, the Defendants misconstrue the interplay between the ITTA and the evidence in this case. The ITTA applies to create a presumption of undue influence when, among other things, there has been any transfer ***22** of real estate or a major transfer of personal property or money by **elderly** dependent persons for less than full consideration. See 33 M.R.S. §1022(1). The term "major transfer of personal property or money" is defined as a transfer of items or assets representing 10% or more of an **elderly** person's estate. *See* 33 M.R.S. §1021(5).

In this case, however, there was a unitary transaction. The Warranty Deed signed on October 20, 2008 transferred to John and Cheryl not only the land and buildings located at 7 Lawrence Street, but also conveyed all of "the contents therein, including all power and hand tools..." (App. at 37). As reflected by the trial testimony regarding post-conveyance disputes between Pat and her children over the organization of the house, John and Cheryl exercised dominion over all property, real and personal, located at 7 Lawrence Street. See, for example, TT I at 213. Further, the Defendants did not contend at trial that there had not been a major transfer of personal property for their benefit.

Under these circumstances, the Superior Court was fully justified in treating the October 20, 2008 conveyance as a major transfer of personal property in violation of the ITTA and in ordering that personal property be returned to the premises.

II. THE JUDGMENT AGAINST JOHN MCCOLLOR FOR UNDUE INFLUENCE IS SUPPORTED BY THE EVIDENCE.

For the reasons stated above this Court should affirm the judgment entered against John and Cheryl for violation of the ITTA, and if it does so the issue of John's liability at common law for undue influence is somewhat superfluous. The Superior Court did not impose any additional ***23** remedies upon John that were unique to the undue influence finding. [7] Accordingly, the following discussion of John's common law liability will be brief.

At common law, when it is alleged that a transaction was procured through the exercise of undue influence the plaintiff has the burden of proving by a preponderance of the evidence: a) that she was in a confidential relationship with the defendant, in which she placed trust and confidence in the defendant and there was a disparity in knowledge and/or position between the parties; and b) the defendant received a benefit flowing from the relationship and his influence over the plaintiff. See Theriault v. Burnham, 2010 ME 82, 16, 2 A. 3d 324, 326 & 326, n.2; *Ruebsamen v. Maddocks*, 340 A. 2d 31, 35 (Me. 1975). Although not all family relationships involve confidential or fiduciary relationships, such relationships are frequently found to exist when

there have been financial transactions between family members. *See Bryan R. v. Watchtower Bible and Tract Society,* 1999 ME 144, ¶19,738 A. 2d 839, 846.

In this case there is ample evidence that Pat and Fred McCollor reposed substantial trust and confidence in their son John to advise them on a variety of subjects. (TT I at 38). Once Fred became ill the parents' reliance upon their son increased. In Pat's words, she and Fred were so stressed "that we had to have somebody with a clearer mind than we had at that time." (TT I at 48). In particular, Pat and Fred relied upon John to provide them with accurate information concerning the possible effects of Fred's medical expenses. As an information technology specialist employed by the State of Maine (TT II at 18), John appeared to possess superior knowledge regarding government benefit programs such as MaineCare. Therefore, when John announced to Pat on October 20, 2008 that the family residence could be taken by MaineCare ***24** unless it was transferred to John and Cheryl, that announcement generated immediate fright and caused Pat to agree to the conveyance without further time for reflection. (TT I at 37).

As the record reflects and John now concedes, there was no need to transfer the house to "save it" from MaineCare. In fact, the transfer of the house resulted in a MaineCare penalty (App. at 61) that could have further depleted Fred's assets. Whether John's advice to convey the house was knowingly false or merely careless is not determinative of his liability. The key fact is that while Fred and Pat suffered a detriment, John received a tangible benefit - ownership of 7 Lawrence Street - from the influence he exercised over his parents.

The Superior Court's undue influence judgment was entirely appropriate.

III. THE EVIDENCE SUPPORTS THE SUPERIOR COURT'S ASSESSMENT OF DAMAGES AGAINST JOHN MCCOLLOR FOR BREACH OF FIDUCIARY DUTY.

There is compelling evidence in the record of a) John McCollor's conversion of funds from Fred's band accounts by misusing the limited authority given to him under the POA (App. at 43-53 and b) the extent of John's conversion. See the account summaries admitted as exhibits (App. at 62-67). At trial, John did not dispute the amount of funds he withdrew from Fred's bank accounts and placed in his own bank account, although he claimed that he did not use those funds for his own benefit. (App, I at 167-168). After Fred's death John agreed that he emptied the remaining funds in Fred's accounts by withdrawing the additional sum of $8,773.16. These transfers occured after John's authority under the POA had ended and after it was not possible for Fred to benefit from the use of those funds. (TT I at 188). Other than the purchase of a lift chair for Fred (TT I at 176), John did not provide evidence that his funds transfers resulted in any benefit to Fred or Fred's Estate.

***25** The Superior Court assessed compensatory damages against John and in favor of Fred's Estate in the amount of John's fund transfers from Fred's accounts minus the cost of the lift chair. (App. at 25). The Court found that John "moved money in an effort to hide the funds from MaineCare and used the funds for his own benefit." (App. at 20). In light of the record, it is curious for the Defendants to now assert that the Superior Court committed clear error in its assessment of damages. Apparently, the Defendants are inviting this Court to make a de novo evaluation of the evidence and of John's credibility (or lack thereof). This Court should decline that invitation and uphold the award of damages.

CONCLUSION

For the reasons stated in her brief, Plaintiff-Appellee Patricia A. McCollor respectfully requests that this Court affirm the judgment entered by the Superior Court.

Footnotes

1 The complexities and limitations of MaineCare's “estate recovery” powers as applied to a jointly-owned personal residence are not discussed in the record.

2 The unsuccessful attempt by the Defendants to place in evidence a document called “Order Summary” generated by Gateway Title (App. at 40) is discussed in the Argument, infra.

3 Subsequently, Attorney Donald Gasink succeeded Pat McCollor as Personal Representative of Fred McCollor's Estate.

4 The claim of conversion, at least insofar as it involved the transfer of a GMC pickup truck, was voluntarily dismissed before trial. (App. at 13).

5 Although the ITTA does not require that the **elderly** person be dependent upon the specific person to whom the transfer of property was made, in this case Pat both depended upon John and transferred her home to him.

6 It is worth noting that, unlike John, Cheryl was not found liable for common law undue influence or breach of fiduciary duty. She was not ordered to pay compensatory damages to Fred's Estate.

7 The Superior Court did assess compensatory damages for John's breach of fiduciary duty, but that liability arose from John's conversion of Fred's funds in 2010 and 2011 rather than from the October 2008 conveyance. Although the evidence appeared to justify an award of punitive damages against John, the Court declined to do so. (App. at 23).

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